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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,

Plaintiff,

vs.

Donald Day, Jr.,

Defendant.

CR-23-08132-PCT-JJT

**GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION TO
DISMISS INDICTMENT**

Defendant Donald Day, Jr. was charged with making two specific online threats, the elements and facts of which are clearly alleged in the Indictment (Doc. 3). Whether those threats violated 18 U.S.C. § 875(c) should be decided by a jury after hearing all of the evidence and context at trial. The United States has sufficiently alleged violations of 18 U.S.C. § 875(c) such that the case against Defendant should proceed to trial. Moreover, Defendant's motion to dismiss, which essentially previews arguments he can make at trial under Rule 29 or during his closing argument, is premature. As a result, Defendant's motion should be denied.

Background

For at least several months, including in December 2022 and February 2023, Defendant made postings and comments online to incite violence and threaten various groups and individuals, including law enforcement and government authorities. *See* Indictment ¶¶ 1-15 (Doc. 3).

1 On December 16, 2022, Defendant threatened to kill law enforcement officers. This
2 threat was made four days after his friends (referred to in the Indictment as “Individual 1”
3 and “Individual 2”), shot and killed two police officers who came to their home looking
4 for a missing person, wounded a third officer, and killed a neighbor who came to
5 investigate. Indictment ¶¶ 7-10, 17-18, 21 (Doc. 3). As the Indictment alleges, shortly
6 after killing the officers on December 12, 2022, Defendant’s friends posted a video online
7 stating “[t]hey came to us, and we killed them. If you don’t defend yourself against these
8 devils and demons, you’re a coward.” *Id.* ¶ 19. They specifically mentioned Defendant in
9 their video, saying “We’ll see you when we go home. We’ll see you at home, Don. Love
10 you.” *Id.* Defendant responded to the video saying, among other things, “I tell you, family,
11 that those bastards will regret that they ever fucked with us,” “our enemies will become
12 afraid of us,” “We too, will never ever bow to the scum which plagues us,” and “We love
13 you, we care for you. -Don and Annie.” *Id.* ¶ 20. Individual 1 and Individual 2 later died
14 in a shootout with police. *Id.* ¶ 18, n.1.

15 Four days later, on December 16, 2022, Defendant posted a video titled “Daniel and
16 Jane” to his YouTube channel, “Geronimo’s Bones.” *Id.* ¶¶ 21-23. In the video, Defendant
17 said, among other things, “And here, my brave brother and sister, a son and a daughter of
18 the Most High have done exactly what they were supposed to do, and that is kill these
19 fucking devils.” *Id.* ¶ 21. Defendant then stated, “[w]ell, like my brother [Individual 1],
20 like my sister [Individual 2], it is no different for us. The devils come for us, they fucking
21 die. It’s just that simple. We are free people, We are owned by no one.” *Id.* ¶ 21 & Count
22 1. Defendant made this statement after previously publicly posting on a social media
23 platform that he is an “x-con, who’s armed to the teeth” and that he owned multiple
24 firearms. *Id.* ¶ 16.

25 Two months later, in February 2023, Defendant threatened T.G., the Director
26 General of the World Health Organization. T.G. appeared in a video discussing the
27 discovery of a new, Ebola-like, virus in Equatorial Guinea; the virus had a high mortality
28

1 rate and there were no approved vaccines. *Id.* ¶¶ 12-14. Defendant commented on T.G.’s
 2 video, stating “it is time to kill these monsters, and any who serve them.” *Id.*, Count 2.

3 On November 29, 2023, the grand jury issued a two-count indictment charging
 4 Defendant with violating 18 U.S.C. § 875(c), which prohibits interstate communications
 5 containing any threat to injure another person. Count 1 concerned Defendant’s threat to
 6 law enforcement, whom he, Individual 1 and Individual 2 had repeatedly referred to as “the
 7 devils.” Count 2 concerned Defendant’s threat to T.G.

8 Argument

9 **I. Standard**

10 Defendant’s motion to dismiss the Indictment (Doc. 23) is governed by Rules 7 and
 11 12 of the Federal Rules of Criminal Procedure. Rule 7 requires the indictment “be a plain,
 12 concise, and definite written statement of the essential facts constituting the offense
 13 charged.” Fed. R. Crim. P. 7(c)(1). “A legally sufficient indictment must state the elements
 14 of the offense charged with sufficient clarity to apprise a defendant of the charge against
 15 which he must defend, and to enable him to plead double jeopardy.” *United States v.*
 16 *Givens*, 767 F.2d 574, 584 (9th Cir.), cert. denied, 474 U.S. 953 (1985), citing *Hamling v.*
 17 *United States*, 418 U.S. 87, 117 (1974). “An indictment which tracks the words of the
 18 statute charging the offense is sufficient so long as the words unambiguously set forth all
 19 elements necessary to constitute the offense.” *Id.* “The indictment should be read in its
 20 entirety, construed according to common sense, and interpreted to include facts which are
 21 necessarily implied.” *Givens*, 767 F.2d at 584, citing *United States v. Anderson*, 532 F.2d
 22 1218, 1222 (9th Cir.), cert. denied, 429 U.S. 839 (1976).

23 Rule 12 provides a defendant can move for dismissal based on a defect in the
 24 indictment, including failure to state an offense. Fed. R. Crim P. 12(b)(3)(B)(v). In
 25 considering a motion to dismiss, the Court is required to “accept the truth of the allegations
 26 in the indictment in analyzing whether a cognizable offense has been charged” and is
 27 “bound by the four corners of the indictment.” *United States v. Boren*, 278 F.3d 911, 914
 28 (9th Cir. 2002) (citation omitted) (holding district court erred in dismissing indictment).

1 “A motion to dismiss the indictment cannot be used as a device for a summary trial of the
 2 evidence.” *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1995) (citation omitted)
 3 (holding district court erred in dismissing indictment). And the Court can consider a motion
 4 to dismiss only where it involves questions of law rather than fact. *United States v. Shortt*
 5 *Accountancy Corp.*, 785 F.2d 1448, 1452-53 (9th Cir. 1986) (holding “it was within the
 6 trial judge’s sound discretion” to deny motion to dismiss and “defer the issue to jury
 7 consideration”).

8 **II. Analysis**

9 The Indictment here satisfies the requirements of Rule 7. It states the elements of
 10 the offense with sufficient clarity to apprise Defendant of the charges against him. It
 11 closely tracks the elements and language of the applicable Ninth Circuit Model Criminal
 12 Jury Instruction, Instruction 8.13, and includes the statutory language of 18 U.S.C.
 13 § 875(c). Model Instruction 8.13 states:

14 First, the defendant knowingly transmitted in [interstate
 15 commerce] [foreign commerce] a [*insert form of*
 16 *communication*] containing a threat to [[kidnap] [injure]]
 [*insert name or title of natural person*].

17 Second, such [*insert form of communication*] was transmitted
 18 for the purpose of issuing a threat, or with knowledge that the
 19 [*insert form of communication*] would be viewed as a threat.

20 The government need not prove that the defendant intended to
 21 carry out the threat.

22 Instruction 8.13, Manual of Model Criminal Jury Instructions for the District Courts of the
 23 Ninth Circuit (2022 Edition, last updated August 2023).¹

24 The Indictment includes all these elements (and more). It alleges Defendant
 25 “knowingly transmit[ted] in interstate and foreign commerce” communications in the form
 26 of “a video posted on YouTube” on December 16, 2022 (Count 1), and a “comment[] on a

27 ¹Available at [https://www.ce9.uscourts.gov/jury-instructions/sites/default/files/](https://www.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2023_08.pdf)
 28 [WPD/Criminal_Instructions_2023_08.pdf](https://www.ce9.uscourts.gov/jury-instructions/sites/default/files/WPD/Criminal_Instructions_2023_08.pdf).

1 video, posted on BitChute” in February 2023 (Count 2). It further alleges these
 2 communications included threats to “injure the person of another” that is “any law
 3 enforcement official who comes to [Defendant’s] residence” (Count 1) and T.G. (Count 2).
 4 Both Counts 1 and 2 allege Defendant acted “with the intent to communicate a true threat
 5 of violence and with recklessness as to whether the communication would be viewed as a
 6 true threat of violence,” consistent with *Counterman v. Colorado*, 600 U.S. 66, 77-79
 7 (2023) (holding government must prove the defendant “consciously disregarded a
 8 substantial risk that his communications would be viewed as threatening violence”).

9 The allegations in Counts 1 and 2 (on pages 5-6 of the Indictment) would be
 10 sufficient standing alone. But the Indictment includes additional allegations in paragraphs
 11 1-24 (pages 1-5) that provide context for the charges in Counts 1 and 2. Read in its entirety,
 12 with common sense and necessarily implied facts, the Indictment clearly lays out
 13 Defendant’s communications that are alleged to have violated 18 U.S.C. § 875(c). *Givens*,
 14 767 F.2d at 584.

15 Defendant’s motion does not argue the Indictment is unclear about the charges
 16 against him or that it omits an essential fact or element. Rather, Defendant moves to dismiss
 17 the Indictment on First Amendment grounds, arguing his communications were not “true
 18 threats.” *See* Motion at 6-9 (Doc. 23). Defendant’s motion also argues his communications
 19 were not addressed to a “person” within the meaning of 18 U.S.C. § 875(c). *See* Motion at
 20 3-6 (Doc. 23). As discussed below, the questions raised by defendant’s motion should be
 21 decided by a jury after hearing all the evidence, including evidence not included in the
 22 Indictment.

23 **A. Counts 1 & 2 allege true threats.**

24 The Indictment sufficiently alleges Defendant’s communications – “The devils
 25 come for us, they fucking die” and “It is time to kill these monsters” – were true threats of
 26 violence. “True threats of violence are outside the bounds of First Amendment protection
 27 and punishable as crimes.” *Counterman v. Colorado*, 600 U.S. 66, 69 (2023). A true threat
 28 is a serious expression conveying that a speaker means to commit an act of unlawful

1 violence to a particular individual or group of individuals. *Virginia v. Black*, 538 U.S. 343,
 2 359 (2003). The term “true” distinguishes what is at issue from jests, hyperbole, or other
 3 statements that when taken in context do not convey a real possibility that violence will
 4 follow. *Watts v. United States*, 394 U.S. 705, 708 (1969).

5 “Whether a statement amounts to a ‘true threat’ is a question of fact best decided by
 6 a jury.” *See, e.g., United States v. Zavalidroga*, 165 F.3d 1241, No. 97-10290, 1998 WL
 7 403361, at *1 (9th Cir. 1998); *United States v. Stock*, 728 F.3d 287, 298 (3d Cir. 2013) (“In
 8 the usual case, whether a communication constitutes a threat or true threat ‘is a matter to
 9 be decided by the trier of fact.’”) (citation omitted); *United States v. Syring*, 522 F. Supp.
 10 2d 125, 134 (D.D.C. 2007) (“[W]hether Defendant’s communications constituted a true
 11 threat is an issue properly left to the jury as the trier of facts.”). A district court should
 12 dismiss an indictment only if the language is so facially insufficient that no reasonable jury
 13 could find that the language amounted to a true threat. *Zavalidroga*, 1998 WL 403361, at
 14 *1; *United States v. Toltzis*, No. 14-CR-00567-RMW, 2016 WL 3479084, at *3 (N.D. Cal.
 15 Jun. 27, 2016) (denying motion to dismiss counts alleging violations of 18 U.S.C.
 16 § 876(c)).

17 A reasonable jury could conclude Defendant’s threats in Counts 1 & 2 of the
 18 Indictment are true threats. As context for Count 1, the Indictment alleges Defendant’s
 19 friends, Daniel and Jane, admitted to killing police officers, whom they referred to as
 20 “devils and demons,” who came to their home. Indictment ¶¶ 7-11, 17-19 (Doc. 3). The
 21 Indictment alleges that, four days later, Defendant responded by posting his own video
 22 praising Daniel and Jane for having “done exactly what they were supposed to do, and that
 23 is to kill these fucking devils.” *Id.* ¶ 21. Defendant went on to threaten that a similar fate
 24 would happen if the “devils” came for him. *Id.* ¶ 22 (“Well, like my brother Daniel, like
 25 my sister Jane, it is no different for us. The devils come for us, they fucking die.”). Given
 26 the context alleged in the Indictment, as well as additional context that will be presented at
 27 trial, a reasonable jury could conclude defendant’s threat in Count 1 was a true threat.
 28

1 Similarly, a reasonable jury could conclude Defendant's threat against T.G. was a
 2 true threat. As context for Count 2, the Indictment alleges T.G. appeared in a video
 3 discussing a new, Ebola-like, virus. Indictment ¶¶ 12-14. Defendant commented on T.G.'s
 4 video, saying "It is time to kill these monsters, and any who serve them. Where are my
 5 kind? Where are you? Am I the only one? Fuckin' hell." *Id.*, Count 2. Given the allegations
 6 in the Indictment, as well as additional context that will be presented at trial, a reasonable
 7 jury could conclude defendant's threat in Count 2 was a true threat.

8 Defendant's motion does not acknowledge the low, "no reasonable jury," standard
 9 for his motion to dismiss. Instead, his motion argues that the communication in Count 1
 10 "cannot fairly be read as 'a serious expression of an intent to commit an act of unlawful
 11 violence'" and that the communication in Count 2 'is not an 'expression of intent' at all.
 12 Motion at 8 (Doc. 23). Whether the communications at issue are serious expressions of
 13 intent to commit acts of unlawful violence is a question for the jury to consider after it has
 14 heard all the evidence.

15 Defendant likens his case to *Watts v. United States* and *United States v.*
 16 *Bagdasarian*. See Motion at 8 (Doc. 23). His reliance on these cases is misplaced, however.
 17 The alleged threats in *Watts* (against then-President Johnson) and *Bagdasarian* (against
 18 then-Presidential candidate Obama) and the context surrounding them are very different
 19 than the threats at issue here. See *Watts*, 394 U.S. 705, 706-08 (1969) (discussing "crude
 20 offensive" comments Watts made at a public rally at the Washington Monument);
 21 *Bagdasarian*, 652 F.3d 1113, 1115 (9th Cir. 2011) (discussing "repugnant" statements that
 22 "directly encourage violence" which Bagdasarian posted to Yahoo! message board).²

23
 24 ² Defendant also briefly mentions in his Motion that *Watts* supports that the
 25 statement underlying Count 1 is too conditional to be a true threat. See Motion at 8 (Doc.
 26 23). However, as the Ninth Circuit has explained, "the conditional nature of a statement
 27 may be a factor in determining whether it constitutes a true threat," but it "is not
 28 dispositive." *United States v. Sutcliffe*, 505 F.3d 944, 961 (9th Cir. 2007) (citing *United*
States v. Watts, 394 U.S. 705, 708 (1969)); see also *United States v. Weiss*, No. 20-10283,
 2021 WL 6116629, at *2 (9th Cir. Dec. 27, 2021); *United States v. Havens*, 793 F. App'x
 475, 476 (9th Cir. 2019). Rather, "[m]ost threats are conditional; they are designed to

Moreover, citing *Watts*, Defendant's motion wrongly suggests "even violent political hyperbole ... [is] constitutionally protected." Motion at 6 (Doc. 23). Given the facts alleged in the Indictment, Defendant's threats were far from political hyperbole. According to the Indictment (Doc. 3), Defendant has had a history of inciting violence against law enforcement and government authorities (§ 15), encouraged individuals in Australia who engaged in a deadly shootout with law enforcement, has publicly acknowledged that he is an "x-con, who's armed to the teeth" (§ 16), and has publicly announced that if law enforcement came for him, his plan would be to attack and kill them (Count 2). These facts are far different than the facts of *Watts*. Additionally, contrary to Defendant's argument, Ninth Circuit case law holds defendants can still intend to threaten when their goal is political, or when the threat occurs in a political context. *E.g.*, *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1079 (9th Cir. 2002), as amended (July 10, 2002) (finding sufficient evidence of intent to intimidate based on context where anti-abortion group created "wanted" posters of abortion providers); *United States v. Sirhan*, 504 F.2d 818, 820 (9th Cir. 1974) (upholding conviction where defendant threatened to kill Golda Meir on behalf of Palestinian Liberation Organization).

Regardless of the underlying facts, *Watts* and *Bagdasarian* do not support granting Defendant's motion to dismiss at this early stage, before the government has an opportunity to present evidence at trial. Both *Watts* and *Bagdasarian* went to trial and the appellate

accomplish something; the threatener hopes that they *will* accomplish it, so that he won't have to carry out the threats." *Sutcliffe*, 505 F.3d at 961 (quoting *United States v. Schneider*, 910 F.2d 1569, 1570 (7th Cir. 1990)). As a non-dispositive factor in the true-threat analysis, whether Defendant's threat in Count 1 was conditional does not support dismissing the Indictment. Moreover, as the Indictment alleges, Defendant was issuing threats to law enforcement should they show up at his residence, while at the same time publicly supporting individuals in Australia who executed law enforcement officers and broadcasting that Defendant was a convicted felon in possession of firearms, all of which would ultimately support that he issued true threats.

1 courts in both cases relied on evidence presented at trial in holding they did not amount to
 2 true threats. *See, e.g., Watts*, 394 U.S. at 707 (noting evidence showed both Watts and the
 3 crowd laughed after his statement was made); *Bagdasarian*, 652 F.3d at 1121-23
 4 (discussing evidence regarding the defendant’s gun possession, the reactions of persons
 5 who read his posts, and an email he sent two weeks after his posts). The courts in *Watts*
 6 and *Bagdasarian* concluded that the government did not present sufficient evidence at trial
 7 to establish the defendant’s communications were true threats. *Watts*, 394 U.S. at 707;
 8 *Bagdasarian*, 652 F.3d at 1123. *Watts* and *Bagdasarian* do not suggest those cases should
 9 have been dismissed before trial. Likewise, this case should not be dismissed before trial.

10 **B. Counts 1 & 2 sufficiently allege threats against natural persons.**

11 Defendant argues that both counts charged against him should be dismissed because
 12 18 U.S.C. § 875(c) is limited to “natural persons.” Motion at 3 (Doc. 23). Defendant
 13 contends that Count 1, which alleges that Defendant threatened “any law enforcement
 14 official who comes to [Defendant’s] residence” in Arizona, should be dismissed because it
 15 does not allege a threat against a specific natural person or a sufficiently finite group of
 16 individuals. *Id.* at 4. Defendant contends that Count 2, which alleges a threat against the
 17 Director General of the World Health Organization, should be dismissed because,
 18 according to Defendant, the language of the threat itself is more likely aimed at the World
 19 Health Organization as an entity or the entire global health community. *Id.* at 5.

20 The only case that Defendant cites in support of his arguments is *United States v.*
 21 *Havelock*, 664 F.3d 1284 (9th Cir. 2012); however, Defendant misconstrues the holding of
 22 *Havelock*. The defendant in *Havelock* mailed multiple envelopes that were addressed to
 23 entities, including media outlets and music-related websites. *Id.* at 1287. The envelopes
 24 contained a copy of his manifesto, which was not specifically addressed to any person. *Id.*
 25 The manifesto included multiple ramblings but also included statements that indicated
 26 prospective violent acts such as, “I will give my life[] [a]nd I will take as many of the
 27 baneful and ruinous ones with me” and “I will slay your children. I will shed the blood of
 28 the innocent.” *Id.*

1 Because the defendant's mailings were all addressed to non-natural entities, namely
2 newspapers and websites, and the defendant's manifesto was not addressed to a natural
3 person, the court reversed the defendant's conviction and ordered that an entry of acquittal
4 be entered. *Id.* at 1296. In doing so, the court found that the use of the word "person" in
5 18 U.S.C. § 876(c) means a "natural person" as opposed to non-natural entities such as
6 corporations. *Id.* at 1292-93. The court focused on the fact that the language and context of
7 § 876(c) did not allow for criminalization of threats to kidnap or injure non-natural entities.
8 *See id.* at 1292 ("[T]his is not an absurd result. One of the purposes of § 876 is 'the
9 preservation of the recipient's sense of personal safety.' The recipient's sense of personal
10 safety is simply not implicated when the recipient is an entity.") (internal citation omitted).

11 The Court's holding in *Havelock* does not support Defendant's argument for
12 multiple reasons.

13 First, as Defendant acknowledges, the *Havelock* Court focused on the "addressed to
14 any other person" prong of 18 U.S.C. § 876, not the specific language of the statute under
15 which the United States has charged Defendant, 18 U.S.C. § 875. *See* Motion at 5 (Doc.
16 23).

17 Second, Defendant incorrectly relies on *Havelock* to make the point that the group
18 of victims in Count 1 alleged against Defendant, i.e., "any law enforcement official who
19 comes to [Defendant's] residence," is less specific than the group of victims alleged in the
20 *Havelock* indictment, namely "children and persons in the vicinity of the Super Bowl XLII
21 event in Arizona." *See* Motion at 5 (Doc. 23). However, in *Havelock*, the language of the
22 indictment was not even at issue. The court never addressed whether the group of victims
23 as alleged by the Government in the indictment was sufficient because the court was
24 analyzing the sufficiency of the evidence underlying the defendant's conviction at trial and
25 reviewing what the facts at trial showed about the victims/recipients.

26 Third, even if the holding in *Havelock* applies to § 875, *Havelock* does not support
27 the proposition that Defendant relies on in his motion, namely that the groups of victims
28 alleged in Counts 1 and 2 of the Indictment against Defendant fail to allege a "natural

1 person” sufficient to comply with the statute. *See* Motion at 5 (Doc. 23).

2 The Ninth Circuit has consistently found that groups of natural persons, as opposed
 3 to specific individuals, are sufficient recipients for purposes of the threat statutes. In fact,
 4 in the aftermath of *Havelock*, the Ninth Circuit made this point clear in *United States v.*
 5 *Keyser*, 704 F.3d 631, 641 (9th Cir. 2012). In *Keyser*, a defendant convicted of violations
 6 of 18 U.S.C. § 876 for mailing threatening packages to an unidentified “Manager” at
 7 Starbucks and McDonald’s argued that his convictions should be overturned because his
 8 threats were not mailed to a “natural person.” The Court rejected that argument and
 9 specifically discussed the holding in *Havelock* concluding that, “[t]here is nothing in the
 10 *Havelock* court’s reasoning that indicates we should require a threat to be addressed to one
 11 particular, previously-identifiable person . . . and we see no reason to confine the phrase
 12 ‘any other person’ to anything less than its own broad terms.” *Id.* at 641. *Cf. United States*
 13 *v. Stahlnecker*, No. 20-50173, 2021 WL 5150046, at *2 (9th Cir. Nov. 5, 2021) (holding
 14 that 18 U.S.C. § 875(c) “does *not* require the particular person threatened be identified by
 15 name”); *United States v. Linehan*, 835 F. App’x 914, 917 (9th Cir. Nov. 17, 2020) (“Section
 16 875 does not require proof that a defendant threatened to injure any particular person.”).

17 Because groups of victims of threats are considered “natural persons,” courts have
 18 consistently denied motions to dismiss indictments based on arguments similar to those
 19 raised by Defendant, even in cases in which the alleged victims/recipients of the threats are
 20 broad in scope. *See, e.g., United States v. Dennison*, No. 2:21-cr-00149-JDL-1, 2022 WL
 21 834437, at *2-*3 (D. Me. Mar. 21, 2022) (denying a motion to dismiss an indictment
 22 charging a violation of 18 U.S.C. § 875(c) where defendant posted an online threat to “kill
 23 Jews with my ar15 tomorrow” and finding that the indictment was sufficient such that the
 24 case should be presented to the jury); *United States v. Hussaini*, No. 19-60387-CR-
 25 ALTMAN, 2022 WL 138474, at *8-*9 (S.D. Fla. Jan. 14, 2022) (denying a motion to
 26 dismiss an indictment charging violations of 18 U.S.C. § 875(c) where defendant posted
 27 videos on YouTube threatening to kill “Christians,” “religious people,” and “black people,”
 28 finding that “blacks and Christians *are* ‘discrete and identifiable’ groups” such that the case

1 should proceed to the jury to analyze the context of the defendant's threats); *United States*
2 *v. Naylor*, No. 8:12-CR-378, 2013 WL 1867064, at *2 (D. Neb. May 3, 2013) (denying a
3 motion to dismiss indictment charging a violation of 18 U.S.C. § 876 where an envelope
4 containing white powder was addressed to a business, Mutual of Omaha, but the district
5 court found that the threat was ultimately to "whichever Mutual of Omaha employee had
6 the misfortune to open the letter.")

7 As a result, the United States has sufficiently alleged natural persons in Counts 1
8 and 2 of the Indictment to overcome Defendant's motion to dismiss. In Count 1, the United
9 States alleged a group of "natural persons," namely law enforcement officials (federal,
10 State, or local) who would respond to Defendant's residence. *See* Indictment, at Count 1
11 (Doc. 3). As the Indictment (Doc. 3) alleges, Defendant has had a history of inciting
12 violence against law enforcement and government authorities (§ 15), encouraging
13 individuals in Australia who engaged in a deadly shootout with law enforcement, publicly
14 acknowledging that he is an "x-con, who's armed to the teeth" (§ 16), and publicly
15 announcing that if law enforcement came for him, they would die (Count 1). Given all of
16 the context contained in the Indictment, the group of law enforcement officials allegedly
17 threatened by Defendant is substantially more narrow in scope than groups of unspecified
18 law enforcement officials in threats cases in which courts have denied similar motions to
19 dismiss indictments.

20 For example, in *United States v. Ziobrowski*, No. 18-10250-DJC, 2019 WL
21 3306802, at *1 (D. Mass. Jul. 23, 2019), the district court denied a defendant's motion to
22 dismiss the indictment charging the defendant with posting on social media that he would
23 pay \$500 "to anyone who kills an ice agent." Similar to Defendant, the defendant in
24 *Ziobrowski* argued that the Government had not alleged a true threat based on a lack of an
25 identifiable victim. *Id.* at *3. In denying the motion, the court found that the Government
26 had sufficiently alleged that the online statement constituted a true threat against ICE
27 agents and should move forward to trial. *Id.*

28 As another example, in *United States v. Abdulkadir*, No. 0:16-CR-00002-KES-

1 VLD, 2016 WL 659711, at *1 (D. Minn. Feb. 18, 2016), the defendant was charged for
2 posting on his Twitter account threats to the FBI and an unnamed federal judge. The
3 defendant's statements included "#kill them FBI" and "I'm kill them FEDS for take my
4 brothers." *Id.* When the defendant moved to dismiss the indictment because the statements
5 were against "federal law enforcement officers" as opposed to a specific "federal law
6 enforcement officer," the district court disagreed. *Id.* at *2. The court denied the
7 defendant's motion, reiterating that "courts have consistently interpreted statutes that
8 prohibit threats against an individual to also include threats against identifiable groups of
9 individuals." *Id.*

10 In Count 2, the United States has also sufficiently alleged a threat to a specific
11 "natural person." The United States' Indictment alleges that Defendant threatened a
12 specific, individual, "T.G." who at the time of the alleged threat "was the Director General
13 of the World Health Organization." Indictment ¶¶ 12, 14, and Count 2 (Doc. 3). The
14 Indictment explicitly ties Defendant's threat to a video depicting T.G. speaking about a
15 newly discovered virus. *Id.* ¶ 14 and Count 2. Defendant's argument that the language of
16 the threat in Count 2 does not support that the threat is actually aimed at T.G. is a question
17 for the jury. Moreover, even if, as Defendant argues, the threat is aimed at a group larger
18 than just T.G., such as members of the larger global health community who promote
19 positions on public health similar to T.G.'s views, such an identifiable group still
20 constitutes a "natural person" for purposes of 18 U.S.C. § 875(c).

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Conclusion

For all of these reasons, Defendant's motion to dismiss the Indictment should be denied.

Respectfully submitted this 9th day of January, 2024.

GARY M. RESTAINO
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s/David A. Pimsner
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Certificate of Service

I hereby certify that on January 9, 2024, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants: Mark Rumold.

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